



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 507 OF 2013

IN THE MATTER OF THE ESTATE OF NYANDUKO KANYIMBO (DECEASED)

NEMWEL OCHARO KARANI.....OBJECTOR/APPLICANT

VERSUS

JAMES ONTITA KANYIMBO..... 1ST PETITIONER

QUEEN KARANI KANYIMBO 2ND PETITIONER

RULING

1. The estate which is the subject of this cause relates to **Nyanduko Kanyimbo**(the deceased) who died intestate on 6th June 1982. The objector, **Nemwel Ocharo Karani**, had filed summons citing the 1st petitioner vide **Succession Cause No. 90 of 2013** to take out letters of administration but later on discovered that the petitioners had filed the instant cause and had been issued with a grant on 12th May 2014 which was subsequently confirmed on 13th November 2015.

2. That prompted him to file the summons for revocation of the grant dated 17th July 2014. In the said summons that applicant seeks the following orders; that the grant of administration which was issued and confirmed be revoked, that the register in respect of L. R. No south Mugirango/ Boikanga/1715 be retained in the names of the deceased Nyanduko Kanyimbo and that an prohibitory order of injunction be issued restraining the petitioners from disposing off, selling, alienating and or approaching the assets of Nyanduko Kanyimbo particularly L R No. South Mugirango/ Boikanga/1715. In his supporting affidavit in support of the application that applicant avers that the deceased had two sons, his father **Karani Kanyimbo**(deceased) and the 1st petitioner, **James Ontita Kanyimbo**. He states that upon citing the petitioners they proceeded to file this cause secretly and lied that his father had died in Tanzania. The objector asserts that he and his mother, Hellen Moraa Karani are beneficiaries of the estate as they are entitled to his father's portion of estate and faults the petitioners for failing to include them as such.

3. The objector's counsel, Mr. Sagwe withdrew **Succession Cause No. 90 of 2013** and took directions to canvass the application through oral evidence. The petitioners did not testify or file responses despite being served with the summons for revocation of grant and the matter proceeded to hearing *ex parte*.

4. The objector testified that his father and the 1st petitioner, James Ontita, were the sons of the deceased. That his father, Karani Kanyimbo Mogunde died and been buried in South Mugirango and not in Tanzania as claimed by the petitioners. That he had 4 sisters, one of whom had died and stated that he is the only son. The deceased was the registered proprietor of land parcel No. 1715 which the petitioners had subdivided, between themselves, leaving him out yet he, his mother and the petitioners lived on the

same land.

5. The objector further testified that the 2nd petitioner, Queen was from Kisii South where she had been married and where her mother had also gotten married and been buried. That her mother had once been the wife of his father but had left and been married elsewhere. His father's plot had boundaries and that the demarcations had not been interfered with. He urged the court the court to revoke the title and redistribute the land to enable him get a portion of the land. He adopted his affidavits, the exhibits annexed thereto and his statement as his evidence.

6. **Thomas Obiko Nywanga** (PW 2) testified that he knew the 1st petitioner, the objector and his mother Hellen. He stated that he knew the objector had 4 sisters and that the objector was the only son. He went on to adopt his statement as his evidence and urged the court to grant the objector's request.

7. **Pasifika Sarange Omboto** (PW3) testified that the objector was his brother's child. She adopted her statement filed on the 1.8.2019. She deponed that the deceased was her brother, he died and was buried in Nyakeyo village. He left behind a wife Hellena Moraa and children. The deceased first wife deserted her brother and remarried elsewhere. That a case in Nairobi between the mother of the mother of Queen, Moraa and Mabeche and it was resolved that Moraa Mabeche and her children belonged to Mabeche and not my brother Karani.

8. Learned counsel for the in his written submissions, counsel argues that the objector and his mother Hellen are beneficiaries of the estate as evidenced in a letter dated 4th January 2015, from the assistant chief which lists them as such. He also highlighted the evidence of PW 2 and PW 3, who both confirmed that the objector and his mother are beneficiaries of the estate. Counsel submits that the petitioner's failure to include them was a deliberate misrepresentation and amounted concealment of material facts.

9. He relied on the cases of ***Samwel Wafula Wasive vs Hudson Siminy Wafula Civil Appeal No. 161 of 1993, Richard Kitiwa Muli v John Kisalu Nguli HCCC No. 21 of 1991, In the matter of the estate Robert Napunyi Wangila Succession Cause No. 2203, In the matter of the estate of Mwana Mutugi Gichigo Mburu alias Mwaura Mbura (deceased) Succession Cause Number 935 of 2003 and In the matter of the estate of Peter Minike (deceased P & A No. 13 of 1998*** in support of the argument that a grant should be revoked where the petitioner fails to disclose material facts. The court is also urged to order the land registrar to cancel all titles arising from the defective grant.

10. Upon considering the summons for revocation of grant, the affidavits, the oral evidence and the submissions, I find that the question that this court is asked to determine is whether the grant issued to the petitioners should be revoked.

11. The relevant provision of the law is **Section 76** of the **Succession Act** which provides;

76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion –

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) ...

(e)...

12. The objector's case is that he and his mother were not included as beneficiaries of the estate of the

deceased. The objector had filed **Succession Cause No. 90 of 2013** citing the 1st petitioner who ranked higher than him in priority to take out letters of administration.

13. My perusal of the proceedings in Succession Cause No. 90 of 2013 shows that the court ordered the 1st petitioner to commence succession proceedings and take out letters of administration in respect of the deceased's land parcel South Mugirango / Nyataro/ 1715 and in default the objector be allowed to petition the court for the grant himself. The record shows that the 1st petitioner was aware of the citation as he filed a replying affidavit on 4th June 2013. He nevertheless proceeded to file the instant cause on 24th September 2013 and listed the following as beneficiaries of the estate;

- a. Queen Karani Kanyimbo- granddaughter;
- b. James Ontita Kanyimbo- son;
- c. Margaret Kwamboka- granddaughter; and
- d. Nyansarora Charani- daughter.

14. The objector insists that he is also a beneficiary of the estate. He states that his deceased father Karani Kanyimbo was the 1st petitioner's brother and the son of the deceased. He called his father's sister PW 3 who testified in support of his claim. PW 2 who had known the Karani Kanyimbo (deceased) testified that he was married to Hellen Moraa Karani and had 5 children with her including the objector. Despite being served with the application, the petitioners did not file their responses therefore the objector's assertions stand uncontroverted.

15. Concerning the right of grand children to inherit from the deceased, the Court of Appeal in the case of **Christine Wangari Gachigi v Elizabeth Wanjira Evans & 11 others Civil Appeal No. 221 of 2007 [2014] Eklr** held;

“Although Sections 35 and 38 of the Laws of Succession Act is silent on the fate of surviving grandchildren whose parents' pre-deceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The law on this is section 41. If a child of the intestate has pre-deceased the intestate then that child's issue alive or en ventre sa mere or that date of the intestate's death will take in equal shares per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate takes between them the share their parents would have taken had the parent been alive at the intestate's death.”

16. Similarly Musyoka J. in **the Matter of the estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR** held as follows:-

“.....Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents. In this case, the applicant's mother survived the deceased. She is the one entitled under Part V to inherit her mother, the applicant's deceased grandmother. The applicant clearly has no claim under Part V so long as his mother survived the deceased.

17. Since the objector's father Karani Kanyimbo had passed away, the objector and his siblings are entitled to inherit from the estate in his stead as can be drawn from the foregoing authorities. **Section 51 (2) of Law of Succession Act** also provides that an application for a grant of representation shall include

information as;

g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

18. The petitioners therefore concealed a material fact from the court by failing to list the objector and his siblings as beneficiaries and by failing to reveal the fact that he and his mother lived on the deceased's land parcel No. South Mugirango/ Boikanga/ 1715. Furthermore, PW 3 who testified that she is a daughter of the deceased was not included by the petitioners in their Form 5. I am satisfied that the objector has made out a case for revocation of the grant as the grant was obtained fraudulently upon non- disclosure of material facts by the petitioners.

19. For these reasons, I allow the summons for revocation of grant in the following terms;

a. The grant issued on 12th May 2014 and confirmed on 13th November 2015 is hereby revoked.

b. Any transmission under the aforementioned grant in regard to Land Parcel No. South Mugirango/ Boikanga/ 1715 is hereby nullified and title shall revert to the name of the deceased. The applicant will serve this order on the Land Registrar for action.

c. A fresh grant shall issue forthwith to the 1st petitioner James Ontita Kanyimbo and the objector, Nemwel Ocharo Karani jointly;

d. The administrators or any of them shall file an application for confirmation of grant within sixty (30) days. A mention date to be taken in court to confirm compliance and further direction.

e. Each party shall bear its own costs.

Dated, signed and delivered at Kisii this 31st day of October 2019.

R.E.OUGO

JUDGE

In the presence of;

Objector/ Applicant Absent

Petitioners/ Respondents Absent

Rael Court clerk